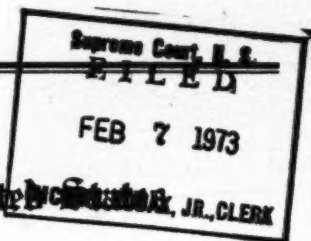


SUPREME COURT, U. S.



IN THE
Supreme Court of the United States
OCTOBER TERM, 1972
No. 72-914

SARAH SCHEUER, Administrator of the Estate of
Sandra Lee Scheuer, Deceased,

Petitioner,

—v.—

JAMES RHODES, SYLVESTER DEL CORSO, ROBERT CANTERBURY, HARRY
D. JONES, JOHN E. MARTIN, RAYMOND J. SRP, Various Officers and
Enlisted Men and ROBERT WHITE,

Respondents.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Introductory Statement

Petitioner does not wish to burden the Court with further arguments on whether the writ should issue. It is believed, however, that a short reply may clarify a few points raised by Respondents' opposition briefs and thus aid the Court's deliberations.

POINTS IN REPLY

A. Reply to Brief of Respondents Del Corso, Canterbury, Jones, Martin, Srp and White.

1. At pages 1 and 2 of their brief, Respondents have rephrased the second question presented. The rephrasing presents the view that the Court of Appeals made a distinction between Respondent Rhodes, who was governor of Ohio when he engaged in the conduct leading to this suit, and the other defendants, granting an absolute immunity to the former but only a qualified immunity to the latter. Nothing in the record seems to support that position. Judge Weick's opinion for the majority treated all defendants as covered by the same immunity. He concluded:

The governor, the officers of the National Guard, and the President of Kent State University all have executive immunity. (20a)¹

Judge O'Sullivan concurred in Judge Weick's opinion and did not devote any space in his own opinion to discussing the immunity issue. If the Court of Appeals had thought the immunity it granted was qualified, it should have at least determined whether application of the immunity at the pleading stage was consistent with the allegations of the complaint.²

¹ References to the pages of the Appendix, attached to the Petition for a Writ of Certiorari, will be made as (—a).

² The allegations of culpability in the complaint would seem to satisfy any conditions, if the immunity were conditioned. The usual method for disposing of conditioned immunity issues before trial is by summary judgment motion, in which the defendant sets forth

2. At page 8 of their brief, Respondents contend that the Governor's Executive Proclamation is conclusive of both the facts it recites, and of the legality of the Respondents' conduct, and that such proclamation somehow forms an evidentiary base supporting the factual conclusions reached in the opinions below. In part, this contention presses the legal conclusion, rejected in *Sterling v. Constantin*, 287 U.S. 378 (1932), that gubernatorial conduct and declaration is conclusive and unreviewable. Whether the Court ought to consider this issue will be discussed *infra* at page 4. As a procedural point, there was no factual matter appended to the motions to dismiss of the sort which would turn them into defendants' motions for summary judgment. The only attachments were the executive proclamations activating the Ohio National Guard (23a) and recording their assignment to Portage County (Kent State University) and Franklin County (Ohio State University) (25a). They evidence nothing more than the fact that the National Guard was activated and ordered to the places mentioned and do not even recite the underlying circumstances.

3. At pages 10-12 of their brief, respondents argue that the district judge and Judge O'Sullivan were authorized to go beyond the pleadings and find facts because the motion to dismiss was jurisdictional in nature, falling under Rule 12 (b)(1) of the Federal Rules of Civil Procedure, rather than Rule 12(b)(6). Petitioner's complaint about the judges' conduct is more basic. They found exculpatory facts with-

the facts supporting the conclusion that the culpability allegations are not factually supportable. See, e.g., *Washington Post Co. v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966). Otherwise, the issues are factual and therefore triable.

out a record before them and in the face of contrary allegations in the complaint. To the extent such factual conclusions had a bearing on the decisions below, petitioner was denied a chance to prove her case.

4. At pages 23-27 of their brief, respondents contend that the subject matter of this action is non-justiciable because it involves the conduct and operations of the National Guard. This issue was not directly considered below in this case, although, as the Court knows, it is the principal contention of the petitioner in *Gilligan v. Morgan*, No. 71-1553, cert. granted, October 24, 1972, a case involving many of the same facts and issues as this one. Petitioner believes, however, that the result in *Gilligan v. Morgan* may bear strongly on the outcome of this case and has so stated to the Court.³ Indeed, if the unusual result reached below were not enough justification for granting the writ, the commonality of issues in this case and *Gilligan v. Morgan* would support their resolution on a record raising all of their ramifications and thus justify issuance of the writ in this case.

5. At pages 13-16 of their brief, respondents argue the contrary of petitioner's claim that the holding below adopting executive immunity for all defendants is against the weight of authority. This reply brief is not the proper place to resolve a dispute over whose cases hold what. At the very least, respondents' position supports the issuance of the writ to resolve the question.

³ In December, 1972, the petitioners in *Gilligan* filed a suggestion of mootness and, in response, counsel for respondent in *Gilligan* (who is also counsel for petitioner in this case) suggested that one of the factors militating against mootness in *Gilligan* was the pending petition in this case. At that time, the petitioner in *Gilligan* and the respondents in this case took the position that there were no common issues and objected to any consolidation.

6. At page 27 of their brief, respondents contend that claims relating to Ohio National Guard training and weapons involve the United States, which was not sued, as an indispensable party. A similar statement was made in Judge Weick's opinion (19a), although he does not appear to have relied on the point as a ground of decision. Petitioner has no objection to the point being considered, although it would seem to have little weight. In the context of a damage action, such as this one, the most that can be said for the claim, based upon respondent's contention, not the complaint, is that the United States is a joint tortfeasor. It is not normally the rule that all joint tortfeasors need be sued under threat of dismissal for failure to join indispensable parties. See generally, I F. Harper and F. James, *The Law of Torts* §10.2 and esp. p. 720 (1956). The United States is, of course, immune from suit except under the Federal Tort Claims Act.

B. Reply to Brief of Respondent Rhodes.

1. Respondent Rhodes argues rather stridently at pages 6-7 that the pleadings are improper and at pages 10-11 that as governor of Ohio he was not responsible for the conduct of Ohio National Guard troops under any theories of agency law. Both positions reflect a rather fundamental misconception of the complaint. There is no claim for vicarious liability in the complaint, nor are the allegations respecting Respondent Rhodes limited to the claim that he activated the Ohio National Guard and ordered contingents to duty in and about Kent State University. The specific acts of misconduct of Respondent Rhodes by which, it is alleged, he effected a deprivation of life without due process of law are that he

... ordered members of the Ohio National Guard on and about Kent State University's main campus when such action was unnecessary ... engaged in rhetoric and gave Ohio National Guard officers orders which substantially increased the risk of unnecessary violence[,] ... permitted ... troops ... to carry guns loaded with live ammunition, under circumstances in which the carrying of such loaded guns greatly increased the risk of shooting innocent persons ... [and] ordered members of the Ohio National Guard to break up all assemblies without regard to whether said assemblies were lawful or unlawful ... (87a)

2. Respondent Rhodes argues, at pages 11-12 of his brief, that even if his conduct were wrongful, it did not proximately cause the death of petitioner's decedent. While this contention was raised below, it was not relied upon as a ground of decision. It appears unlikely that the Court's consideration of this issue at this time would enhance the progress of the case and the issue is not in itself serious enough to justify Supreme Court consideration. Cf. *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 524-558 (1957) (dissenting opinion of Justice Frankfurter).

The prevailing view, of course, is that the extent to which a subsequent event breaks the legal chain of causation is ordinarily one for the jury to decide under appropriate instructions. See, e.g., *Petitions of Kinsman Transit Co.*, 338 F.2d 708 (2nd Cir. 1964); *Marshall v. Nugent*, 222 F.2d 604 (1st Cir. 1955); *Pease v. Sinclair Refining Co.*, 104 F.2d 183 (2nd Cir. 1939); *Hines v. Garrett*, 131 Va. 125, 108 S.E. 690 (1921).

CONCLUSION

The briefs in opposition to the petition in this case demonstrate, at the very least, that the writ should issue.

Respectfully submitted,

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IN THE
Supreme Court of The United States

October Term, 1972

No. 72-1318

**ARTHUR KRAUSE, Administrator of the Estate
of Allison Krause, Deceased, *Petitioner,***

vs.

**GOVERNOR JAMES RHODES, SYLVESTER DEL CORSO, and ROBERT CANTERBURY,
*Respondents,***

and

**ELAINE B. MILLER, Administratrix of the Estate
of Jeffrey Glenn Miller, Deceased, *Petitioner,***

vs.

JAMES RHODES, SYLVESTER DEL CORSO, ROBERT CANTERBURY, HARRY D. JONES, JOHN E. MARTIN, RAYMOND J. SRP, ALEXANDER STEVENSON AND VARIOUS OFFICERS AND ENLISTED MEN AND ROBERT WHITE, *Respondents.*

**BRIEF OF DEFENDANT-RESPONDENT
JAMES A. RHODES IN OPPOSITION**

BRIEF OF OTHER RESPONDENTS ADOPTED

Counsel for Respondent James A. Rhodes (in his individual capacity), which Respondent was Governor of Ohio at the commencement of this action, adopts and incorporates herein the Brief in Opposition to the Peti-

tion filed in this Court by Charles E. Brown, Counsel of Record for the Respondents; Robert F. Howarth, Jr. and William W. Johnston, all of Crabbe, Newlon, Potts, Schmidt, Brown and Jones, Counsel for the Respondents.

In supplement to the statements and arguments therein set forth in behalf of such of the named Respondents as were served with process, Respondent James A. Rhodes (hereinafter referred to as Respondent Rhodes) presents additional grounds why Petitioner's cause should not be reviewed by this Court.

QUESTIONS PRESENTED

1. Respondent Rhodes agrees that the division and restatement of Petitioner's Question #1 as proposed in the Brief of Respondents Del Corso, et al., accurately poses the issues with respect to Motion to Dismiss, grounded respectively on Rules 12(b) (1) and 12(b)(6), Fed. R. Civ. P. The restated questions are

- a) Is a United States District Court required to take a complaint's allegations as true when deciding a Rule 12(b)(1), Fed. R. Civ. P. Motion to Dismiss?
- b) Is a United States District Court required to take a complaint's allegations as true when deciding a Rule 12(b)(6), Fed. R. Civ. P. Motion to Dismiss?

2. Respondent Rhodes accepts Petitioners' Question #2 as fairly raising the issue whether Amendment XI of the U.S. Constitution denies to the District Court jurisdiction of the subject matter of Petitioners' respective complaints.

3. Respondent Rhodes accepts Petitioners' Question #3 as adequate to present the issue whether Respondent

Rhodes is protected by executive immunity against allegations of the complaints below touching upon his actions taken as Governor of Ohio.

4. Respondent Rhodes denies that Ohio Revised Code §5923.37 "provides for liability" in the circumstances described in Petitioners' Question #4, but despite this defect, accepts Question #4 as a basis for discussing whether the causes of action asserted under diversity jurisdiction reach to Respondent Rhodes.

5. Respondent Rhodes offers the following as his counter-statement of Petitioners' Question #5 for the reason that it presents the issue raised by the decision of the Court of Appeals for the Sixth Circuit:

In an action for damages alleging improper training, arming and procedures of certain Ohio National Guard units, is the United States an indispensable party?

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION

Article I, Section 8, Clause 16:

The Congress shall have Power . . . To provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

Article VI:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land . . .

Amendment XI:

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . .

UNITED STATES CODE, TITLE 28

Section 1331:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Section 1332:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—

- (1) citizens of different States;
- (2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

* * *

Section 1343:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Section 1652:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

UNITED STATES CODE, TITLE 32

Section 108:

If, within a time to be fixed by the President, a State does not comply with or enforce a requirement of, or regulation prescribed under, this title its National Guard is barred, wholly or partly as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law.

Section 110:

The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.

Section 501:

(a) The discipline, including training, of the Army National Guard shall conform to that of the Army. The discipline, including training, of the Air National Guard shall conform to that of the Air Force.

(b) The training of the National Guard shall be conducted by the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia in conformity with this title.

Section 701:

So far as practicable, the same types of uniforms, arms, and equipment as are issued to the Army shall be issued to the Army National Guard, and the same types of uniforms, arms, and equipment as are issued to the Air Force shall be issued to the Air National Guard.

UNITED STATES CODE, TITLE 42:**Section 1983:**

Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

OHIO CONSTITUTION**Article I, Section 16:**

Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

Article III, Section 10:

He [Executive] shall be commander-in-chief of the military and naval forces of the state, except when they shall be called into the service of the United States.

Article IX, Section 3:

The governor shall appoint the adjutant general, quartermaster general, and such other staff officers, as may be provided for by law. Majors general, brigadiers general, colonels, or commandants of regiments, battalions, or squadrons, shall, severally, appoint their staff, and captains shall appoint their noncommissioned officers and musicians.

Article IX, Section 4:

The governor shall commission all officers of the line and staff, ranking as such; and shall have power to call forth the militia, to execute the laws of the state, to suppress insurrection, and repel invasion.

OHIO REVISED CODE

Section 5923.21:

The organized militia may be ordered by the governor to aid the civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion, and shall be called into service in all cases before the unorganized militia.

Section 5923.22:

When there is a tumult, riot, mob, or body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force and violence break or resist the laws of the state, the commander in chief may issue a call to the commanding officer of any organization or unit of the organized militia, to order his command or part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authorities.